FILED
JUN 22 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-1027

IN THE
Supreme Court of the United States

RYAN AUSTIN COLLINS,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

REPLY BRIEF

Charles L. Weber, Jr.
ATTORNEY AT LAW
415 4th Street NE
Charlottesville, VA 22902
(434) 977-4054

Matthew A. Fitzgerald
Counsel of Record
Travis C. Gunn
MCGUIREWOODS LLP
800 East Canal Street
Richmond, VA 23219
(804) 775-4716
mfitzgerald@mcguirewoods.com

Counsel for Petitioner

June 22, 2017

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ARGUMENT

The Commonwealth struggles to deny the circuit split in this case. It ignores the First Circuit's recent observation that the scope of the automobile exception on private residential property "is a significant unresolved issue." *United States v. Goncalves*, 642 F.3d 245, 250 (1st Cir. 2011).

On the merits, the Commonwealth unpersuasively theorizes that a thirty-year old case about a lawful traffic stop and an eighty-year old case about a hot pursuit and search incident to arrest resolve the issue against Mr. Collins. That argument fails—and flies in the face of the modern courts' varying positions on this issue.

Nor are there vehicle issues. Mr. Collins presented and preserved his Fourth Amendment arguments below. The factual predicate for the question presented is undisputed. And the Commonwealth's argument that perhaps it could have prevailed in this case on exigency grounds instead takes nothing away from the danger in the Supreme Court of Virginia's opinion, which relies *solely* on the automobile exception to justify the searches here.

This Court should grant the petition.

I. This case asks the Court an unresolved Fourth Amendment question.

This appeal presents a discrete question of law: "whether the Fourth Amendment's automobile exception permits a police officer, uninvited and without a warrant, to enter private property,

approach a home, and search a vehicle parked a few feet from the house." Pet. i. The facts underlying this question are all undisputed. Nothing in the Commonwealth's brief changes that this question is squarely before this court, and that question remains unanswered.

A. Probable cause and mobility are undisputed.

The Commonwealth spills much ink on undisputed issues and gently messaging its view that Mr. Collins is probably guilty of receiving stolen property. BIO 11-16.

The presence of probable cause and the fact that the motorcycle was capable of travel are undisputed premises of the question presented here. The issue is not whether probable cause existed—for purposes of this appeal, Collins admits it did. Similarly, the motorcycle—like most vehicles located on driveways, in garages, and behind houses—was mobile and could readily reach a road.

Further, the Commonwealth's prosecutorial narrative is irrelevant to the Fourth Amendment question. *Illinois v. Caballes*, 543 U.S. 405, 422 (2005) ("Fourth Amendment protection, reserved for the innocent only, would have little force in regulating police behavior toward either the innocent or the guilty.").

B. *New York v. Class* does not apply.

The Commonwealth stakes far too much on *New York v. Class*, 475 U.S. 106 (1986). BIO 36-37.

Class held that police officers who had made a lawful traffic stop on a public road could lawfully look at the car's VIN number, even if the officer had to enter the vehicle and move aside "obscuring papers." *Class*, 475 U.S. at 114. The Court acknowledged that the officer reaching into the vehicle was a "search" for Fourth Amendment purposes, but found it reasonable. *Id.* at 115. The Court rested in part upon a lesser expectation of privacy for VIN numbers, which normally are printed so as to be visible from outside the vehicle, and which are part of government regulation of all vehicles. *Id.* at 112-115.

Class does not permit roving officers to examine VIN numbers in people's driveways, in garages, or under tarps. In short, the officers in *Class* had every right to stand immediately outside the vehicle they had just pulled over. Every car and truck built since 1969 is designed to allow an officer standing outside to see the VIN number. *Id.* Given that scenario, the Court refused to allow a fistful of obscuring papers to create a privacy right for Fourth Amendment purposes. *Id.* at 114.

By contrast, here an officer walked up a driveway, into the curtilage of the home, and pulled a tarp off of a motorcycle. This was done as part of a criminal investigation (not an immediate traffic stop along a public street).

Class would arguably apply here if the officers had stopped Collins on his motorcycle or found it

parked along a public street with the VIN obscured. But *Class* does not permit the intrusion into the curtilage, just as it would not permit an officer to enter a home to search for a vehicle's paperwork, or break into a garage to inspect a VIN number. The Court repeatedly cited the "undoubtedly justified traffic stop" as a premise of its holding. *Id.* at 119.

C. *Scher v. United States* does not answer the issue here.

The Commonwealth also argues that *Scher v. United* States, 305 U.S. 251 (1938), settles the issue of whether the automobile exception applies within the curtilage. BIO 16-17. The Commonwealth theorizes that despite modern disagreement across various circuits and state courts, the problem is actually solved by a widely ignored, eighty-year old case from this Court. That is incorrect.

Scher involved police officers in 1935 who chased a bootlegger into his garage. 305 U.S. at 253. They had probable cause to stop his car before he entered the garage. *Id.* Thereafter, the bootlegger exited his vehicle and made incriminating statements. *Id.* The Court held that the search of the vehicle "accompanied an arrest, without objection and upon admission of probable guilt." *Id.* at 255.

Lower courts have taken various views of *Scher* in the past eighty years. One popular understanding is that *Scher* simply recognizes an exigency apart from the automobile exception, namely, the hot pursuit doctrine. *E.g.*, *United States v. Newbourn*, 600 F.2d 452, 457 (4th Cir. 1979); *People v. Siegel*, 291 N.W.2d

134, 139 (Mich. Ct. App. 1980). No lower court here has suggested that the hot pursuit doctrine applies.

Another understanding is that *Scher* forms part of the search incident to arrest doctrine as applied to vehicles. *E.g.*, *Coolidge v. New Hampshire*, 403 U.S. 443, 524 (1971) (White., J., concurring and dissenting). No lower court in this case suggested that the motorcycle here was searched incident to arrest.

These views further assume that *Scher* remains good law. Some courts hold that *Scher* was a product of its time—"typical of the prohibition era"—and "searches of stationary vehicles" under that opinion are "arguably no longer permissible after" this Court's opinion in *Coolidge*. *Daygee v. State*, 514 P.2d 1159, 1163 & n. 9 (Ala. 1973).

Even the Commonwealth does not say exactly what *Scher* means for modern Fourth Amendment jurisprudence. The Commonwealth suggests that any warrantless vehicle search in curtilage is constitutional under *Scher*. BIO 16-17. But it also assures this Court that there are some undefined limits of vehicle searches in curtilage. BIO 26-27.

Scher does not authorize carte blanche the warrantless search of a vehicle on a defendant's private residential property. The various fractured interpretations of *Scher* only further support granting certiorari in this case.

II. The Commonwealth cannot deny that a split of authority exists.

The Commonwealth gingerly picks through the precedents at issue here. It concludes that the split is

not a "significant split," and argues that "if there is a split at all, it is a shallow one." BIO 27-28. After an extended discussion of the Fifth Circuit's *Beene* decision, the Commonwealth admits that it "diverges somewhat from the rule in other circuits," and attempts to set aside the Georgia and Illinois cases on the grounds that they are intermediate appellate decisions. BIO 31-32. The Commonwealth ignores the recent view of the First Circuit that the question presented "is a significant unresolved issue." *United States v. Goncalves*, 642 F.3d 245, 250 (1st Cir. 2011).

A. The Fifth Circuit clearly disagrees with the Supreme Court of Virginia.

For at least forty years, the Fifth Circuit has held that the automobile exception does not apply to vehicles parked on the defendant's driveway. *United States v. Pruett*, 551 F.3d 1365, 1369-70 (5th Cir. 1977). Instead, separate exigency is required. *United States v. Reed*, 26 F.3d 523, 529-30 (5th Cir. 1994).

The Commonwealth contends Collins "just intuits" *Reed* holds "that the automobile exception does *not* apply to residential driveways." BIO 28. Not true. The Fifth Circuit itself cites *Reed* as holding that "exigent circumstances are also required to justify a warrantless search of a vehicle when the vehicle is parked in the driveway of a residence." *United States v. Orona*, 166 F. App'x 765, 766 (5th Cir. 2006). Indeed, the *Reed* court held that exigency validated the warrantless search in that case in response to the defendant's argument that the automobile exception did not apply. 26 F.3d at 528-30.

The Fifth Circuit reaffirmed this position last year. The court first acknowledged the general, broad

application of the automobile exception. *United States v. Beene*, 818 F.3d 157, 164 (5th Cir. 2016). The court then restated its longstanding holding that the automobile exception does not apply "when a vehicle is parked in the defendant's residential driveway," and instead exigent circumstances must justify a warrantless search. *Id.*

The best the Commonwealth can do is to criticize *Beene* as "internally inconsistent." BIO 29-30. This ignores that *Beene* is the governing law in the Fifth Circuit. Nor does it diminish the Fifth Circuit's clear statement of law about when the automobile exception does not apply—contrary to the Supreme Court of Virginia's holding. Pet. 5-6.

It has been eight years since the Tenth Circuit "acknowledge[d]" the Fifth Circuit's limitation on the automobile exception. *United States v. DeJear*, 552 F.3d 1196, 1202 (10th Cir. 2009). In *DeJear*, the court applied the Fifth Circuit's reasoning to hold that the automobile exception did apply because the vehicle was not parked at the defendant's residence. *Id.* Rather than adopt the same categorical rule as the Supreme Court of Virginia, the Tenth Circuit aligned itself with the Fifth Circuit. Pet. 20.

B. State courts cannot be cast aside.

The Commonwealth hardly addresses the state court holdings that conflict with the decision of the Supreme Court of Virginia in this case. BIO 31-32.

Fourteen years ago, the Supreme Court of Georgia held that the automobile exception does not apply to a defendant's vehicle parked on his private, residential parking spot. *State v. LeJeune*, 576 S.E.2d

888, 892-93 (Ga. 2003) ("We conclude that the automobile exception does not apply where, as here, the suspect's car was legally parked in his residential parking space, the suspect and his only alleged cohort were not in the vehicle or near it and did not have access to it, and the police seized the automobile without a warrant.").

This holding has been affirmed and clarified to clearly address a vehicle parked on curtilage. *State v. Vickers*, 793 S.E.2d 167 (Ga. Ct. App. 2016). The state court of appeals referred to the "*established Georgia rule* that vehicles, like any other item or location within the curtilage of a residence, are not to be searched without a warrant, consent, or exigent circumstances." *Id.* at 171 (emphasis added).

This authority conflicts with this case—the "established Georgia rule" conflicts with the new rule established by this case in Virginia. The Commonwealth attempts to distinguish *LeJeune* because in addition to holding that the automobile exception did not apply, the court held probable cause did not exist. BIO 32; *LeJeune*, 576 S.E.2d at 892-93. This does not erase the court's initial holding that the automobile exception does not apply to vehicles parked on the defendant's private, residential property. Alternative holdings are not dicta.

Meanwhile, in Illinois, the automobile exception has not applied to vehicles on curtilage for fifteen years. *Redwood v. Lierman*, 772 N.E.2d 803, 813 (Ill. App. Ct. 2002). The Commonwealth argues that how the Fourth Amendment is applied in Illinois does not matter only because it was decided by an intermediate state appellate court. BIO 32. The Commonwealth does not argue that Illinois applies

the automobile exception consistent with the Supreme Court of Virginia.

These cases are from the modern era, but they have been around long enough to warrant this Court's attention. Intermediate appellate courts, particularly when they announce the "established . . . rule" in their states, should not be ignored by this Court.

III. This case is a good vehicle.

A. Curtilage has long been assumed in this case.

Below, the parties litigated this case on the (entirely reasonable) assumption that a motorcycle parked up a dead-end driveway, next to a wall a few feet from the side of the house, was located in the curtilage. *See* App. 8-9 (quoting Collins arguing that the motorcycle was sitting in the curtilage, and the Commonwealth not denying this, but responding that the automobile exception applied).

The Commonwealth also consistently admitted below that the officer's actions were Fourth Amendment "searches" that needed to be justified by some exception to the warrant requirement. *See, e.g.*, App. 37-38. This further supported an assumption that the motorcycle fell within the curtilage.

The Virginia courts followed suit. The Supreme Court of Virginia never held that the motorcycle was outside the curtilage. Indeed, its holding that the automobile exception applied despite the undisputed location of the motorcycle on private, residential property just a few feet from the house appeared premised on the idea that if it *was* within the

curtilage, that did not matter. *See also* App. 30 n.4 (Mims, J., dissenting) (describing the motorcycle as parked "beyond the front perimeter of the house, past the front porch and front door, and . . . merely feet—no more than the width of the sport-utility vehicle parked in front of it—from the side perimeter wall of the house."). For its part, not having heard the Commonwealth deny it, the Court of Appeals simply assumed that the motorcycle was parked in the curtilage. App. 41. Pictures of the scene were in the record for all to see. App. 113-14.

Now, for the first time, the Commonwealth engages in an extended discussion of the curtilage standard and denies that the searches here entered curtilage. But not having asked the state courts to make a ruling on the curtilage issue, the Commonwealth cannot now point to their assumption of curtilage as a vehicle problem. This is improperly "blow[ing] hot and cold" to discourage this Court's review. *See Callanan Road Improvement Co. v. United States*, 345 U.S. 507, 513 (1953).

Moreover, it is undisputed—and the pictures show—that the motorcycle sat beyond the front wall of the house, in an enclosed dead-end driveway just a few feet from the side of the house. App. 113-14.

These basic facts are ample to permit this Court to comfortably address the question presented here: whether and to what extent the automobile exception extends into private, residential property. After all, many courts that have correctly limited the automobile exception only require the vehicle to be on the defendant's private, residential property—not necessarily inside curtilage. *See, e.g., United States v.*

Beene, 818 F.3d 157, 164 (5th Cir. 2016); *United States v. DeJear*, 552 F.3d 1196, 1202 (10th Cir. 2009); *State v. LeJeune*, 576 S.E.2d 888, 892-93 (Ga. 2003).

B. Alternative bases for affirmance ignored by the Virginia Supreme Court do not cut against review.

This case warrants review because of what the Supreme Court of Virginia *did* say about the Fourth Amendment and the automobile exception, not because of what it *might have said* if it had properly addressed those concepts.

At most, the arguments about exigency could warrant a remand for "further proceedings not inconsistent with this opinion" after this Court determines the scope of the automobile exception. This is a common occurrence and not a meaningful vehicle problem. *See, e.g.*, *Skinner v. Switzer*, 562 U.S. 521, 537 (2011) (remanding for lower court to decide appellee's alternative arguments that were not addressed below).

CONCLUSION

The petition should be granted.

Respectfully submitted,

Matthew A. Fitzgerald
Counsel of Record
Travis C. Gunn
MCGUIREWOODS LLP
800 East Canal Street
Richmond, VA 23219
(804) 775-4716

mfitzgerald@mcguirewoods.com

Charles L. Weber, Jr.
ATTORNEY AT LAW
415 4th Street NE
Charlottesville, VA 22902
(434) 977-4054

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